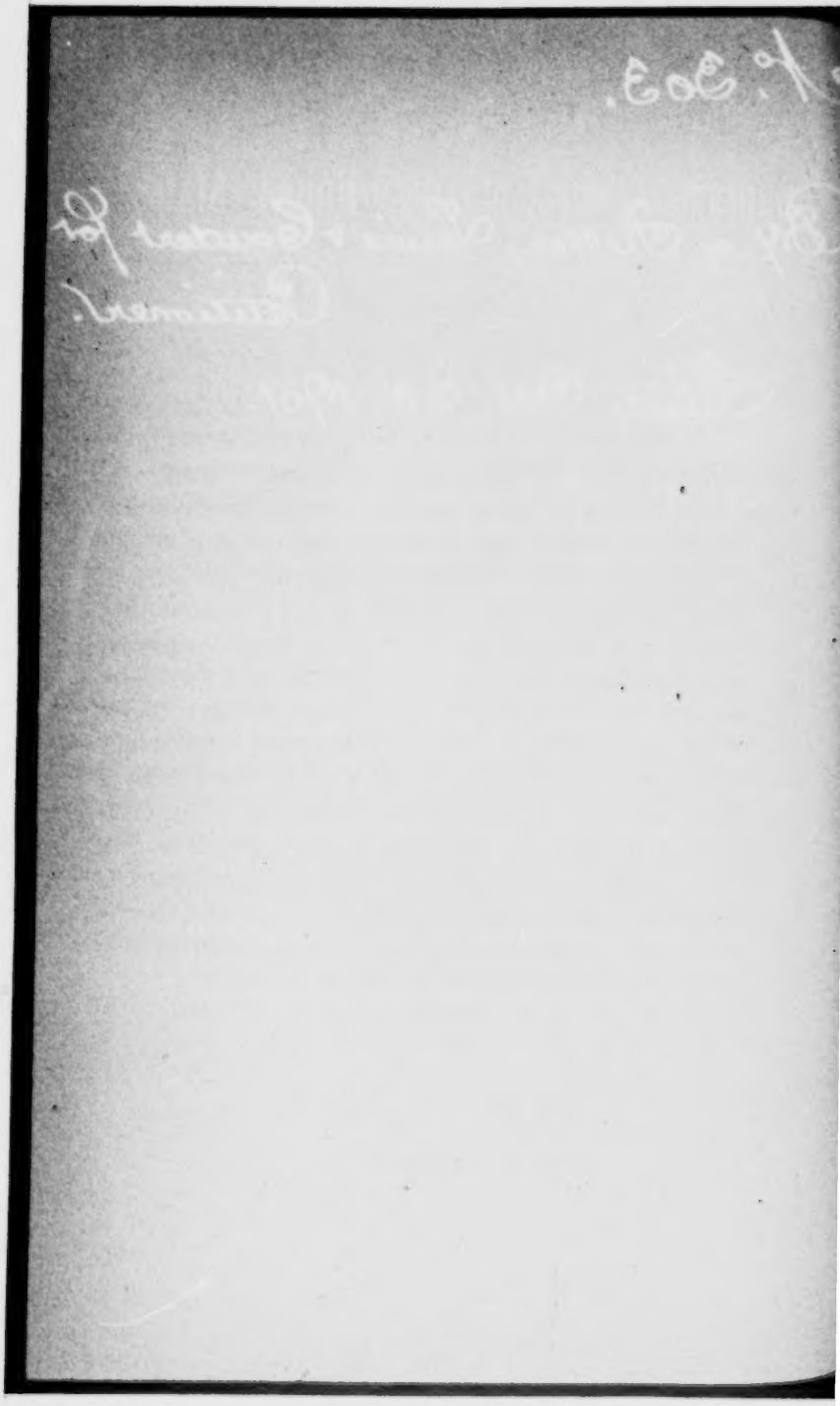

No. 303.

OCT 28 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Brf. of Fuller, Lewis & Coudert for Petitioner.

OCTOBER TERM, 1901.

No. 303.

Filed Oct 23, 1901.

WILLIAM R. TUCKER, Vice-Consul of Russia,

Petitioner

vs.

THE UNITED STATES. ex rel., LEO. ALEXANDROFF.

BRIEF FOR PETITIONER.

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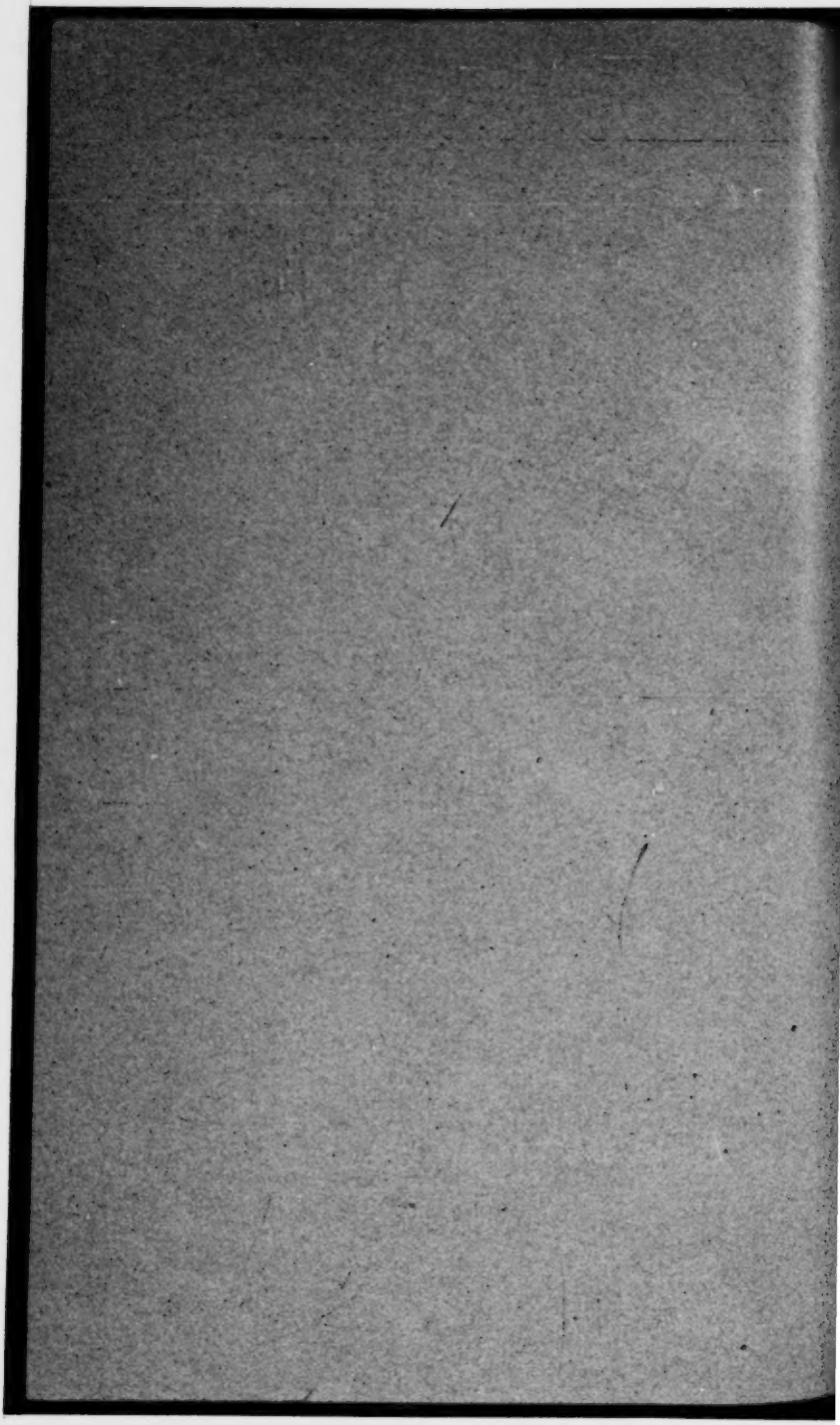
LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.



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SUPREME COURT OF THE UNITED STATES.

OCT. TERM, 1901.

No. 303.

WILLIAM R. TUCKER,
Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES *ex rel.*, LEO ALEXANDROFF.

Brief for Petitioner.

This case is brought before this Court pursuant to a Writ of Certiorari directed to the Circuit Court of Appeals for the Third Circuit (*p. 60, Rec.*).

Statement of Facts.

The Russian Ministry of Marine contracted on April 23rd, 1898, with the Cramp Ship and Engine Building Company of Philadelphia to construct for the Imperial Russian Government a protected cruiser (*p. 18, Rec.*). The vessel was to become at once, finished or unfinished, the exclusive property of the Russian Ministry of Marine and to be insured by the constructors in the name and for the benefit of the said Ministry of Marine (*p. 22, Rec., Arts. 11 and 12 of contract*). The vessel was to be completed in twenty months after the arrival at Philadelphia of a board of inspection provided for in Art. 13 of the contract (*p. 23, Rec.*).

Accordingly, as early as September, 1899, the Russian Government began to make provision for manning the cruiser with officers and seamen of the Imperial Russian

Marine, and on the 24th of September, 1899, applied to the Secretary of the Treasury for leave to land a detail of one officer and fifty-three regular sailors of the Imperial Russian Navy for the purpose of manning the Government's cruiser. This leave was duly accorded, and on several other occasions a like leave was accorded to land other details of officers and men for the same purpose. These applications were on some occasions made to the Secretary of State and by him referred to the Secretary of the Treasury as the appropriate Executive Department to grant the leave requested (*See Correspondence printed by leave of the Court*). This official correspondence attests facts which it is proper to disclose to this Court, and which by suggestion of the United States attorney were sought to be conveyed to the Circuit Court of Appeals (*pp. 42-44-45, Rec.*).

The relator Alexandroff was one of the members of the detail of one officer and fifty-three men mentioned in the permission to land of the 4th of October, 1899 (*p. of Correspondence*).

He had entered the Russian Navy in 1896, he arrived in this country on the 14th of October, 1899 (*p. 5, Rec.*).He came here in company with fifty-three men and accompanied by one officer; at the time he left Russia he knew he was coming here to be a member of the crew of the newly constructed cruiser (*p. 8, Rec.*). He lived with the crew of the Russian ship that was in process of construction, was subject to the superior officers of the crew (*p. 5, Rec.*) during all the time from October to April; received his equipment from the Russian Government, received support and wages from the Russian Government (*p. 8, Rec.*), performed the duties required of him as a member of the crew in so far as it was his place as an assistant physician; had his photograph taken with the other members of the crew (*p. 9, Rec.*).

He left the crew on the 20th of April, 1900 (*p. 6, Rec.*). The vessel had been launched in the fall of the preceding year—October or November (*p. 14, Rec.*).

Immediately after his desertion, affidavit of that fact was made by the Captain of the *Variag* (*pp. 6 &*

15, Rec.), and an application made by Mr. Tucker, the Russian Vice-Consul, to U. S. Commissioner Edmunds under the Treaty of 1832 between the United States and Russia (U. S. Stat., Vol. VIII, p. 444), for the arrest of the deserter, and thereupon the Commissioner issued his warrant for the apprehension of Alexandroff and subsequently committed him to the custody of the Marshal to be held subject to the order of the Vice-Consul or Captain (*p. 4 & p. 10, Rec.*).

Art. IX of the Treaty will be found in the Record, at p. 31, and in an Appendix hereto.

All these proceedings were formally regular (*p. 31, Rec.*). After the commitment of Alexandroff to the custody of the Marshal and the keeper of the Philadelphia prison, application for a writ of *habeas corpus* was made on his behalf and the writ issued (*pp. 1 and 3, Rec.*). The keeper produced the prisoner and made his return, producing the commitment (*p. 2, Rec.*). No traverse to the return was made.

A hearing was had before the District Court, and the prisoner was discharged (*pp. 31, 32, Rec.*).

An appeal was taken to the Circuit Court of Appeals (*p. 33, Rec.*); argument had October, 1900, and in February, 1901, the order of the District Court was affirmed.

On the appeal, the United States Attorney "at the instance of the Executive Department of the Government of the United States" filed a suggestion of certain facts (*p. 37, Rec.—p. 42-p. 46 & pp. 54-55, Rec.*).

Thereafter on petition of William R. Tucker, the Vice-Consul of Russia at Philadelphia, this Honorable Court issued its writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit (*p. 60, Rec.*).

The various grounds upon which the Russian authorities were refused the custody of the deserter as it had been awarded by the United States Commissioner are:

> That the *Variag* was not a completed ship (*p. 32*). That she was not a Russian ship (*p. 32*). That she had no organized crew (*pp. 32, 39*). That the relator was not a member of her

crew (*p. 32*). That the proof required by the Treaty was not produced to the Court (*p. 32*).

That although Alexandroff deserted the Russian naval service (*pp 32, 38, Rec.*) he did not desert the ship, having never been on board of her (*p. 39*). That the detail of officers and men from the Russian Navy "were not an integral component of it" (*p. 41, 42*). That they had no executive permission to land. That they were not recognized or admitted "as a distinctive part of its navy" (*p. 42*).

I.

The District Court had no jurisdiction to issue the writ of *habeas corpus* and liberate a member of the crew of a Russian war vessel from the custody of the captain of the crew or of the Russian Consular officer.

The right of the captain or commander of a crew forming part of the naval forces of a foreign nation to retain such command while in a friendly port by license express or implied was clearly laid down in the case of the EXCHANGE, 7 Cranch, 116, and the other cases cited at length in the dissenting opinion of Judge Bradford (pp. 48-49, Rec.). These cases recognise the universal exemption accorded to warships from the local jurisdiction. In the EXCHANGE the exercise of such a jurisdiction by the ordinary tribunals is characterized as a breach of faith, and it is stated that the general statutory provisions descriptive of the ordinary jurisdiction of the judicial tribunals should not be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction (pp. 146-7).

The right so asserted by this Court does not depend upon any Treaty; the immunity results from the implied license to enter our ports and is a principle of public law. This principle has been embodied and restated in the Treaty between the United States and

Russia, which provides that Consular officers shall "sit "as judges in such differences as may arise between "the captains and crews of the vessels belonging to "the nation whose intertsts are committed to their "charge *without the interference of the local authori-"ties*" (Art. VIII), and that such Consular officers may "require the *assistance* of the local authorities" for the arrest of deserters, and that "such deserters when arrested shall be placed at the disposal of the said Consular officers" (Art. IX).

The exclusive jurisdiction of Consular officers and the observance of this right has been further sustained in the cases of

Wildenhus Case, 120 U. S., 12.
The *Belgenland*, 114 U. S., 364.
The *Belvedere*, 90 Fed. Rep., 109.
The *Amalia*, 3 Fed. Rep., 653-654.

In a case which arose during the Crimean war, where a writ of *habeas corpus* was issued and served at the port of San Francisco upon a British commander who had come into the port with a Russian prize, the commander disregarded the writ and sailed away with the prisoners in whose behalf the writ had been issued. Complaint having been made to the political authorities against this breach of international courtesy and disregard of the judicial jurisdiction the case was referred to the Attorney General; the action of the British commander was sustained and the jurisdiction of the Court to interfere with the commander of a foreign war vessel, in the exercise of the duty devolving upon him as such, was denied.

Belligerent Asylum, VII Atty. Gen'l Op., p. 122.

II.

The treaty with Russia authorizes the consular officers to "require the assistance of the local authorities for "the search, arrest, detention, &c., of the deserters from

" the ships of war, &c. For this purpose they shall [1] " apply to the competent tribunals, judges and officers, "and shall [2] in writing demand said deserters, prov- " ing [3] *by the exhibition* of the registers of the ves- " sels, the rolls of the crews, or by other official docu- " ments that such individuals formed part of the crews; " AND THIS RECLAMATION BEING THUS SUBSTANTIATED, " THE SURRENDER SHALL NOT BE REFUSED."

Art. IX, Treaty of 1832.

The Treaty sets out *the fact to be established,* and prescribes *the measure and the method of proof,* and further prescribes that upon the fact being established by the proof prescribed, the matter is subject to no further dispute and surrender cannot be refused. No provision is made for a review of the question of fact and the intent seems evident to make the decision of that question of fact by the competent tribunal conclusive.

The return to the writ of *habeas corpus* showed that the relator had been apprehended and his custody awarded in accordance with the terms of the Treaty. This return was not traversed. There was no dispute of fact open to investigation: the fact had been determined by the tribunal vested with jurisdiction and discretion to determine it.

The *exhibition* of the register of the vessel or of the roll of the crew to the judicial officer is made conclusive as to the right of the consular representative to have the custody of the deserter.

No effort was made to show that the exhibition of these papers was not duly made to the U. S. Commissioner.

The District Court declared in its opinion that "the " proceedings before the Commissioner were formally " regular " (p. 31, Rec.).

This is equivalent to a statement that the proof required by the Treaty was duly produced, for otherwise the proceedings would have been clearly irregular.

The proceedings being regular, the proof declared

by the Treaty to be sufficient having been offered and passed upon by the competent tribunal, the discretion of that tribunal was not subject to review, and the writ should have been dismissed.

While the District Court further declared that "the testimony taken upon the hearing of this writ of *habeas corpus* discloses no dispute of fact" (*p. 31, Rec.*), it undertakes to pass upon the question of fact as to whether there ever was a crew of the *Variag,* and to determine that "there is no proof that her crew was "ever organized" (p. 31, Rec.). This is determining a question of fact adversely to the determination of the Commissioner; he was only authorized to return the deserter to the custody of the Consul on proof by exhibition of original rolls and registers that the relator formed part of the crew; there is no dispute as to the exhibition of such proof, for it is conceded "that the proceedings before the Commissioner were formally regular" (*p. 31, Rec.*), and no proof was tendered to controvert the fact of such exhibition to the Commissioner.

In other words, the Commissioner had before him the formal proof which the Treaty declared conclusive and upon production of which it enacted that "the surrender shall not be refused;" the testimony taken on the *habeas corpus* hearing disclosed no dispute of fact (*p. 31, Rec.*), and yet the action of the Commissioner is interfered with and set aside on the basis of a fact totally at variance with the fact as held by him.

He passed on the facts, in proceedings the regularity of which is admitted; presumably, therefore, upon the evidence specifically pointed out in the Treaty as conclusive; and under these circumstances his action should not be subject to review.

The judgment of a magistrate in proceedings for extradition that the accused is guilty of the act charged and that it constitutes an extraditable offence cannot be reviewed on the weight of evidence, and is final unless palpably erroneous in law.

Ornelas *v.* Ruiz, 161 U. S., 502.

In extradition cases it has been repeatedly held that a writ of *habeas corpus* cannot be made to perform the functions of an appeal and that the questions to be determined are as to the jurisdiction and authority of the Commissioner to pass on the complaint and the legality of his warrant.

In re MacDonnell, Fed. Cas. 8, 772;
Ex parte Van Aernam, Fed. Cas. 16, 824.

It has again been held that on such a hearing it is competent for the Court to look into the testimony upon which commitments were made.

This was not done in the present case.

U. S. *v.* Bates, Fed. Cas. 14, 544.

The jurisdiction of the Court is the thing to be looked into and the Court will examine the proceedings sufficiently to determine that.

Ex parte Farley, 40 Fed. Rep., 66.

On a petition for discharge of one arrested as a deserter on the ground that he was under sixteen when he enlisted and was induced to enlist by fraud, the return denying the fraud and presenting the written consent of his father and his own sworn statement that he was of age sufficient to enlist was taken as conclusive as to all the facts therein set forth, it having been neither demurred to nor denied.

In re Lawler, 40 Fed. Rep., 233.

III.

It is conceded that the comity extended to war vessels of a friendly nation entitled the commanding officer of the Russian naval force to the custody of the deserter which had been restored to him by the action of the U. S. Commissioner, if the force in question was "organized as part of the military and naval force of Russia coming here for the purpose disclosed in the

record" if the permission was "properly granted by the Government" (*Gray, J., p. 44*).

And it is further conceded that "if the Russian Government had requested their admission as a distinctive part of its navy, and that request had been acceded to by the Executive Department" (*p. 42*), then "Capt. Behr and those who came with him as members of the Russian navy" should be considered as "an aggregation—or integral component of it" (*p. 41*).

The only doubt remaining, therefore, was as to the character of the permission under which the detail of officers and men landed in the United States, the Court holding the permission given through the Secretary of the Treasury, insufficient to establish such executive leave as would attest at one time the national character of the body admitted and give to it the immunities flowing from such a permission duly accorded by the "sovereign of the soil."

This doubt, the existence of which alone prevented the Court below from applying to the case the exercise of the comity which would restore the deserter to his crew, is set at rest by the full correspondence printed by leave of the Court and which supplements the suggestion of the District Attorney and makes clear the entire situation.

A.

Every letter attests that the officers and men for whom permission to land is sought form part of the Russian Navy, according to the requirement laid down in the opinion of Judge Dallas (*p. 41*).

The first letter of June 22, 1899, from the official representative of the Russian Ministry of Marine and attaché to the embassy (*Corresp., p. 1*), to the Secretary of the Treasury, refers to "a detail of one officer and twenty-nine regular sailors, Imperial Russian Navy, for purpose of partially to man our cruiser."

A "detail" is a well known term in military nomenclature. It signifies a part of an organized military body, a squad or detachment of such designated or detailed to a particular service.

The second letter of September 24, 1899 (*Corresp., p. 4*), refers again to "the detail of one officer and fifty-"three regular sailors, Imperial Russian Navy, &c." (This is the detail comprising the relator Alexandroff.)

The third letter, October 5, 1899 (*Corresp., p. 6*), thanks the Secretary for the leave granted to land the "detail of one officer and fifty-three regular sailors, "of which courtesy 'the Russian Government will be at "once informed, for international reciprocity in polite-"ness.'"

B.

A similar application made by the Russian Ambassador directly to Secretary of State (*p. 11, Corresp.*) alludes in like terms to "sailors of the Russian Imperial fleet," and was at once referred by the Honorable Secretary of State to the Secretary of the Treasury and the permission granted by the latter was duly reported by the Secretary of State. This circumlocution was again gone through with for the last contingent of seamen (*p. 12, Corresp.*), and again the Secretary of State referred to the Secretary of the Treasury and reported the permission granted by the latter.

This shows in the first place that the Secretary of the Treasury was the proper organ of the Executive in granting the permission, and secondly that his action in the premises received the sanction of the Secretary of State, the more customary channel of communication with foreign powers.

IV.

The grounds upon which this internationl policy was disregarded and the principle of public law so clearly laid down in the case of the *Exchange* denied its proper application are various and not uniform.

They are extremely technical and give to the rights

and duties arising from friendly international relations,—the full and fair observance of which are so essential to their maintenance,—a narrow construction totally at variance with the broad and liberal interpretation which has hitherto been the rule.

They met, moreover, with a strong dissent from one of the judges of the Circuit Court of Appeals.

We will briefly consider them:

First.—The District Court, McPherson, J., conceding that the relator was a deserter from the Russian Naval Service, that the proceedings were regular, involving no dispute of fact, that the relator was one of a squad of seamen intended as portion of the crew of the *Varing* (*p. 33, Record*), holds:

A. That the *Varing* is an unfinished vessel, intended as a Russian Cruiser, but which may never acquire that character (*p. 32 Record*).

Article 10 and Article 12 of the contract for the construction of the vessel (*Record. p. 22*) shows that the ownership of the vessel was in the Russian Ministry of Marine. The vessel was launched in the fall of 1899 (*p. 14*)—the relator did not desert until April, 1900 (*p. 6*).

Here is a vessel owned by the Russian Ministry of Marine, launched and afloat, with a captain of the Russian Navy assigned to its command, and simply because it was "unfinished" it is held to have forfeited that immunity from foreign interference upon which the good understanding between nations so largely rests.

B. That the relator was not yet a member of her crew; that the vessel had no such organization in the sense intended by the Treaty (p. 39).

Yet the learned judge also holds that "the prisoner and certain associates were ordered to Philadelphia to serve as a part of the cruiser's complement" (pp. 31-32), but insists that technically they did not yet form a crew because "they had not yet begun that service, and may never be called upon to perform it" (p. 32).

The relator gave testimony relevant to the question whether or not he had "begun the service" as a member of the crew.

"I entered the service [the Russian Navy] in 1896. "[Since I have been in America] I lived together with "the crew of the Russian ship that is in process of con- "struction (p. 5). I was never asked to become a "member of the crew [of the *Variag*], but was simply "sent there" (p. 5).

"Q. What was your treatment at the hands of *the "superior officers of the crew* since you have been in "this country?

"A. I cannot say that the superior officer behaved "very well toward me (p. 5).

"*I left the crew* on the 20th of April (p. 6).

"I lived with the crew from October to April. I "received support from the Russian Government, but "I claim I did not ask for it. I was simply compelled "*to serve* and compelled to receive the wages (p. 8).

"Q. Did you *perform the duties required* of you "as a member of this crew while you were here between October and April?

"A. In so far as it was my place as assistant phys- "ician" (p. 9).

Here we have an enlistment in the naval service; a "sending" of the enlisted man to form part of the crew, his living with the crew, subject to a superior officer; his support and payment of wages by the Russian Government, his service under compulsion and his performance of the duties consistent with his assignment. But because the crew had not yet formed their home aboard the vessel, it is held that there was no such organization" as the Treaty contemplated and that the "service was not yet begun." It is under the shelter of such a technicality that a friendly country is held absolved from preserving to the naval authorities of another friendly country the right to maintain that discipline without which neither navies nor commerce could be held together.

C. That "the evidence specifically described and made "necessary by the Treaty itself has not been produced;" that "no register or roll of the crew or other official "document substantiating the Consul's averment has "been produced" (p. 32).

A first answer to this is that the Treaty does not require the production of these papers before the Court on a return to a writ of *habeas corpus;* it authorizes the Consuls when applying to the "local authorities" for aid in the arrest of deserters to prove "that such individuals formed part of the crews" by the simple "*exhibition* of the register of vessels, the rolls of the crews or other official documents" (Art. IX of Treaty, Appendix hereto). These original documents, unsupported by any oath or any testimony are sufficient; they are not to be left with the authorities but simply *"exhibited". Non constat* but that they were so exhibited to the Commissioner before he issued his warrant in aid of the jurisdiction of the Vice-Consul and Captain of the *Variag.*

No evidence was offered to show that this proof was not presented to the Commissioner; on the contrary, the record shows by admission that "the proceedings "have been in accordance with the Treaty and the Re-"vised Statutes (*p. 16, Rec., and Opinion, p. 31, Rec.*).

To be "in accordance with the Treaty" is to admit that "the evidence specifically described and made "necessary by the Treaty," to use the language of the Judge at p. 32, was forthcoming at the proper time and place, to wit, before the authorities whose aid was invoked.

The return to the writ produced the commitment which showed that it had been issued in accordance with the terms of the Treaty, and this return was never traversed.

A second answer to the Judge's statement that no register, roll or "other official document was produced" (p. 32) is that counsel for the Vice-Consul and Captain tendered in evidence the passport issued by the Government authorizing the men composing the crew

to come to the United States, in proof of the fact that the relator came here as a portion of the crew of the cruiser.

The Court considered it unnecessary, stating this ground: "He came here as a member of the Russian "Navy, ordered here to become one of the crew of the "cruiser *Variag*, and he came for that express purpose" (*p. 16, Rec.*).

Here therefore was "an official document" tendered in evidence, and a statement by the Court that the fact to be proved by the document was unquestionably established.

A *third answer* in regard to the fatal character of the alleged omission to present the register of the vessel or other official document, is that the exhibition of these documents and their acceptance as conclusive proof of the status of the person charged with desertion should be considered an amplification and not a restriction of the methods of proof usually required in analogous prosecutions, and that such methods of proof become entirely unnecessary when as in the present case there is such a practical admission by the relator, of the fact to be established.

Second.—*Dallas, J.*, of the Circuit Court of Appeals, insists upon the unfinished condition of the cruiser, and upon the fact that although the men had been assigned to the service of the crew "they had not yet entered upon it," and consequently no crew was yet "in being" (*Rec., p. 39*). Although the cruiser had been launched, the fact that the deserter had not actually been on board of her, (he had performed his duty of assistant physician nevertheless) was considered an important element, on the theory that a crew could not be enlisted until actual sailing and that enlistment for service on board a vessel did not actually make the enlisted man one of the members of that vessel's crew. On these refinements was made to depend the performance of an international duty of the highest order, and under these refinements was buried that comity that makes for universal peace.

The rule of comity as laid down by this Court in the case of the *Exchange* is repudiated, and the right to assistance in the recapture of a deserter is held to depend solely upon the Treaty, which is accepted as indicating "a change of law."

The Treaty, it is held, would have been applicable, had the relator been a member of a crew and had he deserted from a Russian ship, but there being no crew and no ship, the Treaty can not be invoked and therefore neither under the Treaty nor under the rule of comity can the Russian authorities get any relief.

Such comity as is recognized is confined to immunity from the assertion of jurisdiction, and it is insisted that no such jurisdiction was asserted or exercised; that it was the Russian Vice-Consul who invoked the jurisdiction of the Court on the assumption of rights created by the Treaty, and that assumption being unfounded the Court had no recourse but to order the prisoner's release.

This we submit is an error. All that the Vice-Consul did was to call for the assistance of the U. S. Commissioner in making the arrest. It is conceded in the Record that this proceeding was regular and in accordance with the Treaty; it was successful, the deserter was arrested, held, committed and placed at the disposal of the Vice-Counsul.

At this juncture the District Court intervened, asserted and exercised jurisdiction over a member of the crew of the Russian cruiser, removed him beyond the reach of the Vice-Consul or the captain of the cruiser, declared his arrest and detention unlawful, and set him at liberty. This was an active interference such as is prohibited by the Treaty; it was an infringement of the jurisdiction of the Vice-Consul guaranteed by the Treaty; it was an injury to the discipline of the crew of a war vessel of a friendly power, to that extent crippling the efficiency of its naval forces peaceably visiting our country and a violation of the comity which independent of any Treaty assures to friendly nations the domination of their forces.

All this was done on the theory that although "Capt. Behr and those who came with him were members of "the Russian Navy," yet, "as an aggregation they were "not an integral component of it" (*Rec., p. 41*). This we respectfully submit is a close technicality such as should be discarded in weighing the privileges of friendly national forces relying upon the hospitality of our harbors.

Especially in presence of the action of the Executive through the Treasury Department, directing the proper authorities "to admit without examination *the detail "of one officer and fifty-three regular sailors* whom you "state have been *detailed to this country for the pur- "pose of partially manning the cruiser now under con- "struction*," etc. (*Rec., p. 18*).

It was precisely "as an aggregation"—"a detail of "one officer and fifty-three regular sailors"—that this permission was granted, but under the decision which we seek to have reviewed the Russian Government is to lose the benefit of treaty and of comity, because this particular Executive Department is not considered to have done anything but "an act of common courtesy" which cannot be construed into a permission for their landing (*Rec., p. 42*).

Third.—*Gray, J.*, of the Circuit Court of Appeals, while agreeing that the arrest under the Treaty cannot be maintained, admits that Captain Behr "was in com- "mand of the detail of men belonging to the Russian "Navy and awaiting the completion of the ship of war "*Variag*" (*Rec., p. 43*).

He holds that the obligations of public law or comity would apply "to any organized military force, however "small, provided it was large enough to be susceptible "of military organization and of acting offensively or "defensively. In this case, therefore," he continues, "I am of opinion that the detail of fifty-eight men, if "organized as part of the military and naval force of "Russia *coming here for the purpose disclosed by the "record*, might sufficiently possess the character that

" would so far as this case is concerned, be entitled to " receive and enjoy the comity and privileges flowing " from such a permission * * * *if properly " granted by our Government* " (*Rec., p. 44*).

Here we have a divergence of views between the two concurring judges upon a fundamental proposition: whether the body commanded by Captain Behr and including the relator was a body entitled to the exercise of the comity which would exempt it from local jurisdiction.

The exercise of this comity is made dependent upon proper permission being given by the Executive for the foreign contingent to land upon our soil. The plain language of the Secretary of the Treasury admitting the detail of regular sailors and their commander is considered inadequate.

" It falls far short," says Judge Gray, " of conveying " to this Court the information that the requisite per- " mission was granted by the President " (*Rec., p. 45*).

It seems obvious that if the Presidential permission had been established by the Treasury Department order to the satisfaction of Judge Gray he would have considered the detail of fifty-eight men with its commander entitled to the comity which he admits was due to a body duly authorized to land, and Judge Dallas in lieu of Judge Bradford would have been the dissenting member.

The point then justifies some discussion.

The permission, insists the Judge, must be express and unequivocal and cannot be implied. Yet the opinion admits " *that a different rule obtains in the case of ships* " *of war* of one sovereign visiting the ports and waters " of another. There is an implied authority among " nations to tolerate this, and extend to such visits an " international comity, founded on universal custom " and usage among nations. * * * Ships of war " from their vagrant character constantly demand the " hospitality of foreign waters. They are made tra- " verse the waters of the world and all nations find that

" hospitality of foreign waters. They are made to tra-
" foreign waters (*Rec., p. 47*).

In the present case we do not rely upon this implied permission. There is a clear instruction from one of the Executive Departments to admit " the detail of one " officer and fifty-three regular sailors " for the specific purpose of manning a Russian cruiser.

No implication is needed; the leave is explicit. It is *prima facie* plain and sufficient.

It lies upon those who impugn it to overturn it. It is in the interest of good faith among nations and the preservation of friendly relations to sustain its obvious intent.

The only attack made upon it is that it does not purport to give Presidential permission.

It was long since established as a rule of action on the part of the political administration, and sustained by the courts, that the direction of the President is to be presumed in all instructions and orders issuing from the appropriate Departments.

In a communication to the President under date of August 31, 1855, Mr. Caleb Cushing, Attorney General, sets at rest any question on that point, citing the numerous precedents and judicial decisions already to be found (Op. Atty. Genl., VII, p. 453). Judge Bradford, who wrote the dissenting opinion in the present case, has so fully discussed the point, making reference to the adjudications, that we do not feel authorized to extend the discussion here. On one phase only of the contention will we detain the Court. It is contended that such permission is "an international compact which it (the Treasury Department) would " have no authority to make" (*Dallas, J., p. 42, Rec.*), and again, " that the Executive permission in question " is to be given by the President through the Secretary " of State, who is the sole organ of the Executive au-" thority for communication with foreign powers " (*Gray, J., p. 46, Rec.*).

Mr. Cushing, in the communication above referred to, cites the case of *Lockington* v. *Smith*, 1 Pet. C. C. R., 466 (Fed. Cases, No. 8448, Vol. 15, p. 758, 1817):

"It is to this Department (State) that reference must "be made for the official acts of the President in rela- "tion to those public measures which he may estab- "lish, and which are not more immediately connected "with the duties of some other Department. * * * "Nevertheless, the President, for the more easy and "expeditious discharge of his executive duties may di- "rect some other Department to make known the mea- "sures which he may think proper to establish. *They "are equally his acts whether they emanate from the "Department of State or from any other Department"* (VII Atty. Gen'l, p. 455). Apart, therefore, from the fact that the question of the admission of aliens into our Territory is "more immediately connected with the duties of" the Treasury Department than of any other, it is clear that through any Department the President is free to make known any official act.

If, however, any doubts remained as to the action of the Treasury Department being the act of the Executive and as to the intention of the Executive to permit the landing of a naval detail of regularly enlisted men forming part of the naval force of Russia, these doubts are dispelled by the correspondence of the Secretary of State as well as of the Secretary of the Treasury printed by permission of the Court and submitted by way of suggestion of the facts which are of public record.

This correspondence, to which reference has already been made at page 2, establishes (1) That the officer and sailors were an "integral component" of the Russian Navy, and (2) That the permission to land was approved by the State Department, thus dispelling all doubt upon the two points which controlled the judgment of the majority of the Court.

V.

By the testimony and admissions of Alexandroff it appears of record:

A. That he was a deserter from the Russian Imperial Navy (*pp. 5, 8, 9, Rec.*), he was sent here to

become a member of the crew of the Russian cruiser *Variag* (*p. 5, Rec.*); with an officer and fifty-three other sailors (*p. 8, Rec.*); he was subject to the superior officers of that crew (*p. 5*); he lived with that crew (*pp. 5, 8*); he left the crew on the 20th of April, 1900 (*p. 6*), and until then he received equipment, support and wages from the Russian Government (*p. 8*, Rec.) and performed the duties required of him as a member of the crew so far as it was his place as an assistant physician (*p. 9, Rec.*).

He was clearly therefore a member of a crew.

By the evidence of record it further appears that:

B. The *Variag* was a ship.

Mr. Cramp, testifying in June, 1900, declares that the vessel was launched in October or November of the preceding year (*p. 14, Rec.*). Alexandroff testifies that he left the crew on the 20th of April (1900)—(*p. 6, Rec.*). So that the construction had been afloat nearly six months when he deserted.

What is a ship has been the subject of judicial interpretation. "At the moment when she leaves the "ways, and her keel strikes the elements for which "she was originally designed: that is the moment of "her birth as a ship."

The Eliza Ladd, 8 Fed. Cases, 491.

C. Lastly she was a Russian ship.

The ownership of the vessel determines her national character.

U. S. *v.* Jenkins, Fed. Cases, No. 15,473.

The contract—(*p. 17, Rec.*) establishes the ownership beyond controversy. Art. 10 (*p. 22*) provides that the vessel whether finished or unfinished is the "exclusive property of Russian Ministry of Marine," and Art. 12 (*p. 22*) provides for its insurance "in the name of and for the benefit of the Russian Ministry of Marine."

D. The detail of an officer and fifty-three regular sailors of which Alexandroff was one, was a part of the Imperial Russian naval force, subject to its discipline. This naval force was duly permitted by executive authority to land in the United States for the express purpose of manning a Russian cruiser, and became thereby, to use the language of Judge Gray (*p. 44, Rec.*), "exempt from the operation of the civil and "criminal laws of the country."

Upon such a state of facts, both under the Treaty of 1832, and under the exercise of the comity "due where "an organized portion of the military force of one "sovereign enters upon the soil of another with the "permission of the latter" (*p. 44, Rec.*), the custody of Alexandroff as awarded by the U. S. Commissioner should not have been interfered with, the judgments of the Courts below should be reversed, and the relator remanded to the custody of the Vice-Consul of Russia at Philadelphia.

Dated 18 Oct., 1901.

PAUL FULLER.
JOHN F. LEWIS.
F. R. COUDERT, JR.,
of Counsel for Petitioner.

No. 303.

OCT 23 1901

JAMES H. McKENNEY, Clerk

Appx to Pet. of Fuller, Lawrence & Coudert for Cert.

Supreme Court of the United States

OCTOBER, TERM 1901.

Filed Oct. 23, 1901.

No. 303.

WILLIAM R. TUCKER, Vice-Consul of Russia,
Petitioner,

vs.

THE UNITED STATES, *ex rel.*, ALEXANDROFF.

CORRESPONDENCE

WITH

STATE DEPARTMENT AND TREASURY DEPARTMENT.

PRINTED UNDER ORDER OF COURT
OF 25 APRIL 1901.

LIVINGSTON MIDDLEDITCH CO., 65 DUANE ST., N. Y.

UNITED STATES SUPREME COURT.

WILLIAM R. TUCKER,
Vice-Consul, &c.,
Petitioner,

vs.

THE UNITED STATES, *ex rel.*
LEO ALEXANDROFF.

COPY OF MINUTES OF APRIL 25, 1901.

"On motion of Mr. F. R. Coudert, Jr., of counsel for "Petitioner, leave is hereby granted to submit certain "correspondence herein."

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT, April 6, 1901.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true and correct copies of the originals as appears from the files and records in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

L. J. GAGE,
Secretary of the Treasury.

[SEAL.]

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

June 22, 1899.—No. 406.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: The Russian Ministry of Marine, of which in this country I am an official representative, some days ago has sent me a cable purporting that June 12th, on board some steamer, with destination for the United States, from St. Petersburg, Russia, had started a detail of one officer and twenty-nine (29) regular sailors, Imperial Russian Navy, for the purpose of partially to man our cruiser, which at this time as you, Mr. Secretary, perhaps already know, is being under construction for the Russian Government, at Cramps' shipyard, Philadelphia, Pa.

Next week, or the one following the same, I expect this detail of our cruiser's crew will arrive in the port of New York, or that of Philadelphia, Pa., and by this reason I have the honor of respectfully requesting that the necessary orders to the proper United States authorities in the named ports be given, that the expected detail of the Russian cruiser's crew should be allowed to be landed without hindrance, and that of such permission given I should be kindly informed, to be able personally to attend to the business.

Hoping that my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,
(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 19,024. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,

WASHINGTON, D. C., June 23, 1899.

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 22d instant, No. 406, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioners of Immigration at the ports respectively of New York and Philadelphia, to admit without examination the detail of one officer and twenty-nine regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collectors of Customs have also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,
(Signed) L. J. GAGE,
Secretary.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

September, 24, 1899.—No. 557.

Honorable LYMAN J. GAGE,
Secretary of the Treasury,
Treasury Department, Washington, D. C.

DEAR SIR: Following the subject of my letter of June 22d last, and that of yours, No. 19,024, of June 23d, I have again the honor respectfully to request that the necessary orders to whom concerns, would be given for allowing admittance to the United States through the

port of New York without examination the detail of one officer and fifty-three regular sailors, Imperial Russian Navy, detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramp's shipyard, in Philadelphia, Pa.

The arrival of that detail is by me expected about October 7th next. The name of the S. S. Line and of the steamer permit me to advise at a later period.

Hoping my respectful request will be favorably met, I have the honor to remain, highly esteemed Mr. Secretary,

Yours, very truly,
(Signed) D. T. MERTVAGO,
Naval Agent,
Imperial Russian Embassy
to the United States, N. A.

No. 19,805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., October 4, 1899.

General D. T. MERTVAGO,
Naval Attaché, Imperial Russian Embassy,
Washington, D. C.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the Commissioner of Immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian Government at Cramps' shipyard in Philadelphia, Pennsylvania.

The Collector of Customs has also been advised that the usual head tax of $1 is not to be collected in this case.

Respectfully yours,
(Signed) O. L. SPAULDING,
Acting Secretary,
F. A. V.

D. T. MERTVAGO,
Of the Imperial Russian Embassy,
818 18th St. N. W.,
Washington, D. C.

October 5, 1899.—No. 591.

Honorable O. L. SPAULDING,
Acting Secretary, Treasury Department,
Washington, D. C.

DEAR SIR: Your valuable letter of yesterday, communicating the orders of the Treasury Department of the United States, with regard to the detail of one officer and 53 regular sailors now expected by me to arrive to this country by the mail steamer of the American line, "St. Paul," duly received, and I am in haste to present our greatest appreciation of the courtesy extended to us in the case, of which the Russian Government will be informed at once for international reciprocity in politeness.

Yours, very respectfully,
(Signed) D. T. MERTVAGO,
Naval Attaché,
Imperial Russian Embassy
to the United States, N. A.

No. 8600.

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files and records of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of April, A. D. 1901, and of the Independence of the

United States of America the one hundredth and twenty-fifth.

[SEAL.] JOHN HAY.

[Revenue stamp.]

[Translation.]

WASHINGTON, July 24—August 6, 1900.

Mr. SECRETARY OF STATE:

The President of the Commission for the Supervision of the Constuction of the Russian War Vessels in America has informed me that the authorities of Philadelphia have declined to surrender to the proper Russian authorities a deserter, Alexandre Lvoff, assistant surgeon of the cruiser of the first-class, "*Variag*," who was arrested by the said authorities at the request of Commandant Berg, and that the said Alexandre Lvoff has been released by order of Judge McFersen (McPherson) of Philadelphia.

Inasmuch as Commandant Berg's request was based on Article IX of the Treaty of Commerce concluded between Russia and the United States in 1832, I have the honor to address Your Excellency with the request kindly to inform the authorities of Philadelphia that Assistant Surgeon Alexandre Lvoff was one of the crew of the cruiser of the first-class, "*Variag*," and that, having deserted his post of duty, he must be delivered to the Russian authorities, in accordance with the provisions of the above-mentioned treaty.

Accept, Mr. Secretary of State, etc.,

G. DE WOLLANT.

No. 102. DEPARTMENT OF STATE,
WASHINGTON, August 11, 1900.

MR. G. DE WOLLANT,
etc., etc., etc.

SIR: I have the honor to acknowledge the receipt of your note of the 6th instant requesting the assistance of the Department to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears for your note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFerson.

In reply I beg to inform you that a copy of your note has been sent to the Attorney General with the request that, if consistent with his views, he instruct the proper United States district attorney to put himself in communication with the President of the Commission for the Supervision of the Construction of the Russian War Vessels in America, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty of 1832.

Accept, &c.

ALVEY A. ADEE,
Acting Secretary.

DEPARTMENT OF STATE,
WASHINGTON, August 11, 1900.

The Honorable The ATTORNEY GENERAL.

SIR: I have the honor to enclose herewith a copy of a note from the Russian Chargé d'Affaires requesting the Department's assistance to secure the delivery to the Russian authorities of Alexander Lvoff, assistant surgeon of the Russian cruiser *Variag*, who, as appears from the note, was arrested as a deserter by the authorities of Philadelphia, but was released by order of Judge McFersen (McPherson?).

I beg to request that, if consistent with your views, you will instruct the proper United States district attorney to put himself in communication with the Presi-

dent of the Commission for the Supervision of the Construction of the Russian War Vessels in America, mentioned in the note, and to render all proper advice and assistance in aid of the enforcement of the stipulations of the treaty.

I have the honor, etc.

ALVEY A. ADEE,
Acting Secretary.

[Enclosure:]
From Russian Chargé, No. 245, August 6, 1900.

No. 103. DEPARTMENT OF STATE,
WASHINGTON, August 15, 1900.

MR. GRÉGOIRE DE WOLLANT,
etc., etc., etc.

SIR: Referring to your note of the 6th instant, relative to the case of Alexander Lvoff, Assistant Surgeon of the Russian cruiser *Variag*, who, it appears, was arrested as a deserter by the authorities at Philadelphia, and was released by order of Judge McPherson, and to this Department's reply of August 11th, advising you of the reference of the matter to the Attorney General, I have the honor to inform you that I am in receipt of a letter from that official, who states that he has directed the United States Attorney for the Eastern District of Pennsylvania to render all proper advice and assistance to the Russian authorities in aid of the enforcement of the stipulations of the treaty of 1832 upon the subject of the arrest and detention of deserters from ships of war and merchant vessels of each country in the country of the other.

The Attorney General calls attention to the fact that the correspondence does not give the name or address of the President of the Commission for the Supervision of the Construction of Russian War Vessels in America, and he asks that his name be furnished in order that the United States Attorney may be fully informed.

Accept, etc.

ALVEY A. ADEE,
Acting Secretary.

No. 105. DEPARTMENT OF STATE,
WASHINGTON, August 22, 1900.

M. DE WOLLANT, etc., etc., etc.

SIR: Referring to your note of the 6th instant, and to those of this Department of August 11th and 15th, relating to the arrest at Philadelphia as a deserter and the subsequent release of Alexander Lvoff, late Assistant Surgeon of the Russian cruiser *Variag*, I have the honor to enclose a copy of the opinion of the United States District Court granting an order of discharge to the prisoner. In furnishing this copy to me the Attorney General adds that it appears that an appeal on behalf of the Russian authorities has been taken from this judgment to the Circuit Court of Appeals, and that said Lvoff has been held in bail to await the final determination of the proceeding on appeal.

The Attorney General repeats the request communicated to you in my note of the 15th instant for the name and address of the President of the Commission of the Construction of War Vessels in America, in order that the United States Attorney may place himself in communication with that gentlemen and render him all proper advice and assistance in his power.

Accept, etc.,

ALVEY A. ADEE,
Acting Secretary.

[Enclosure:]

Opinion of the United States District Court as above.

(Translation.)

RUSSIAN EMBASSY,
23 November,—6 December, 1900.

MR. SECRETARY OF STATE:

The Russian Minister of the Navy has just informed me that 224 sailors of the Russian Imperial fleet, accompanied by three officers, one doctor, and a commissary, embarked at London on the Amerian Line steamer *Rhineland,* for Philadelphia, where they should arrive about the 16th of December instant.

In view of the fact that these sailors are in the present service of the Russian Government, and 211 of them have been sent to complete the crew of the Russian cruiser *Variag,* and the other 13 are under orders for the *Retvizan,* which is being built by the Cramps, of Philadelphia, I have the honor to request Your Excellency to have the extreme kindness to notify the Treasury Department of the approaching arrival of these sailors, and to request that they may be allowed to land, and that restitution may be made to the superior officer of the tax imposed on emigrants and paid at the time of their embarkation.

Accept, Mr. Secretary of State, etc.,

COUNT CASSINI.

His Excellency,
JOHN HAY,
Secretary of State.

No. 122. DEPARTMENT OF STATE.
WASHINGTON, December 15, 1900.

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 6th instant,* relative to the landing at Philadelphia of certain officers and men for the Russian war vessels *Variag* and *Revizan.*

---

* For this note see insertion, *infra,* p. 13.

Your note was at once referred to the Secretary of the Treasury, who replies as follows:

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative, in advance, for the head tax."

Accept, &c.

JOHN HAY.

(Translation.)

NEW YORK, December 12/25, 1900.

MR. SECRETARY OF STATE: The Imperial Ministry of the Russian Navy has just advised me that 213 seamen of the Imperial Fleet, accompanied by two officers, a monk, and a cook, have embarked at Liverpool on the ship *Belgenland,* bound for the port of Philadelphia, where they are expected to arrive on the 16/29th instant.

In view of the fact that these seamen are sent hither to complete the crew of the Imperial cruiser *Variag,* I hereby pray Your Excellency to inform the Treasury Department of their arrival, so that they may land immediately upon the arrival of the vessel at Philadelphia.

I also beg Your Excellency to have the extreme kindness to allow the free entry of the boxes that are to arrive with the men and contain their personal effects and some articles shipped by the Ministry of the Navy, all for the cruiser *Variag.*

Lastly, I be Your Excellency to take such steps as may be necessary for the return to the commanding officer of the tax imposed on immigrants, which is paid at the time of the sailing of the ship for the United States.

I embrace this opportunity, etc.,

CT. CASSINI.

No. 125. DEPARTMENT OF STATE,

WASHINGTON, December 28, 1900.

His Excellency COUNT CASSINI,
etc., etc., etc.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 25th instant relative to the entry at Philadelphia of the officers, seamen, etc., for the Russian cruiser *Variag*.

In reply, I have the honor to quote for your information the telegram sent on the 27th instant by the Secretary of the Treasury to the Collector of Customs at Philadelphia, and also an extract from Mr. Gage's letter reporting his instructions to the Commissioner of Immigration at the same port:

"Admit to entry free of duty and without examination baggage of two hundred thirteen seamen, two officers, a chaplain, and cook of new cruiser *Variag*, arriving per *Belgenland* on twenty-ninth instant, also articles shipped by Ministry of Russian Navy.

"The Commissioner of Immigration at Philadelphia has been directed to facilitate the landing of the seamen and officers referred to, and the Collector of Customs will refrain from collecting the per capita tax from the steamship company. The said company should be called upon to refund the amount paid to their Liverpool representative in advance for head tax."

Accept, &c.

JOHN HAY.

Office Supreme Court U.S.
FILED
OCT 23 1901
JAMES H. McKENNEY,
Clerk.

TREATY WITH RUSSIA, 1832.

U. S. STATUTES AT LARGE, VOL. VIII, p. 444.

ART. VIII.

"The Consuls, Vice Consuls, and Commercial "Agents shall have the right, as such, to sit as judges "and arbitrators in such differences as may arise be- "tween the captains and crews of the vessels belonging "to the nation whose interests are committed to their "charge, without the interference of the local authori- "ties, unless the conduct of the crews or of the captain "should disturb the order of the tranquility of the "country, or the said Consuls, Vice-Consuls, or Com- "mercial Agents should require their assistance to "cause their decisions to be carried into effect or sup- "ported. It is, however, understood that this species "of judgment or arbitration shall not deprive the con- "tending parties of the right they have to resort, on "their return, to the judicial authority of their coun- "try."

ART. IX.

"The said Consuls, Vice-Consuls, and Commercial "Agents are authorized to require the assistance of the "local authorities for the search, arrest, detention and "imprisonment of the deserters from the ships of war "and merchant vessels of their country. For this pur- "pose they shall apply to the competent tribunals, "judges and officers, and shall in writing demand said "deserters, proving, by the exhibition of the registers "of the vessels, the rolls of the crews, or by any other "official documents, that such individuals formed part "of the crews; and this reclamation being thus sub- "stantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed at "the disposal of the said Consuls, Vice-Consuls or Com- "mercial Agents, and may be confined in the public

"prisons, at the request and cost of those who shall "claim them, in order to be detained until the time "when they shall be restored to the vessels to which "they belong, or sent back to their own country by a "vessel of the same nation or any other vessel whatso-"ever. But if not sent back within four months from "the day of their arrest, they shall be set at liberty, "and shall not be again arrested for the same cause."

No. 303.

Brf. of Fuller for Petitioner

Filed Nov. 14, 1901.

Office Supreme Court U.S.
FILED
NOV 14 1901
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

No. 303.

WILLIAM R. TUCKER, Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES ex rel. LEO ALEXANDROFF.

ON WRIT OF CERTIORARI

Argument for Petitioner.

PAUL FULLER,
Of Counsel for Petitioner.

McGILL & WALLACE, Law Printers.

IN THE

Supreme Court of the United States.

WILLIAM R. TUCKER, Vice-Consul of Russia, Petitioner,

vs.

THE UNITED STATES *ex rel.* LEO ALEXANDROFF.

No. 303.
On Writ of Certiorari.

ARGUMENT FOR PETITIONER.

The questions to be determined by the Court in this case involve the construction of the Treaty stipulations between Russia and the United States, as well as the application of the rules of comity prevailing between civilized nations concerning the immunity of ships of war in a foreign port.

The petitioner, the Vice-Consul of Russia at Philadelphia, claims that both the rules of comity and the stipulations of the Treaty of 1832 have been ignored, to the grave detriment of the discipline of an Imperial Russian cruiser. A member of the crew of the Russian ship of war, the *Variag*, deserted at the port of Philadelphia. By the assistance of a United States Commissioner he was retaken, and in a proceeding admittedly in accordance with the provisions of the Treaty he was committed to the custody of the keeper of the prison, subject

to the order of the Vice Consul, or of the captain of the war vessel to which he was attached. From this custody he was taken under a writ of habeas corpus, issued by the United States District Court at Philadelphia, and his discharge ordered. This decision was affirmed by the Circuit Court of Appeals, and is brought here for review by writ of certiorari.

I.

The Comity of Nations leaves a foreign commander the exclusive control of his force.

The only requisite to this full control of a naval or military contingent of a foreign nation on our soil, is that it shall not have landed or shall not continue on our soil intrusively or without license or permission of the Government.

Whether it is on our soil with or without permission is a political question, to be determined solely by the sovereign power of the State.

In the present case it has not been shown that the sovereign power has in any way questioned the propriety of the detail of officers and men from the Russian Navy remaining on American soil.

The contrary is shown by the permission to land, by the interposition of the Executive Department through the United States Attorney at Philadelphia, and by the official correspondence of the State and Treasury Departments.

The extent of the immunity is not open to question.

It has been laid down in unmistakable terms by this Court in *The Exchange, 7 Cr., 116.*

It involves a waiver of all jurisdiction over the foreign force and the right in its commander "to use that discipline, and to inflict those punishments which the government of his army may require."

The rule is to be applied, with even more liberality, to vessels of war, whose movements are more likely to call them, innocently, into foreign jurisdictions, and whose discipline and safety are made the more precarious by any relaxation of the commander's authority.

It was a violation of that comity to interfere with the custody of Alexandroff, whether such custody was awarded to the commander by a United States Commissioner, or claimed directly by the commander, without such peaceable and orderly intervention. Even if a conflict had resulted from an attempt to obtain such custody, the Treaty of 1832 made the consular officers the sole judges of the controversy.

II.

The Treaty of 1832 made it the duty of the authorities to aid in restoring the deserter to his commander. It did not give our Courts jurisdiction to take the deserter from his custody.

Supplementing the privileges accorded a foreign commander by the Comity of Nations, the Treaty of 1832 with Russia provided a method by which Russian consular representatives might require the assistance of local

authorities in preserving the integrity of the complement of Russian ships of war. (Art. IX., Treaty of 1832.) There is manifestly no purpose in this treaty provision of conferring jurisdiction upon the courts of the United States to determine controversies between commanders and their seamen, for Article VIII of the same Treaty makes the consular officers judges in all differences between captain and crew without interference from the local authorities. The clear and only purpose is to define the conditions upon which the consuls may invoke the aid of the authorities for the arrest and detention of deserters. It is an *ex parte* proceeding, and for that reason the requisites for its inauguration are very specifically pointed out. Upon proof "by the exhibition of the re-"gisters of the vessels, the rolls of the crew, or by any "other official documents, that such individuals formed "part of the crews, * * * the surrender shall not be refused."

The record in this case shows "that the proceedings "before the Commissioner were formally regular, and that "the testimony taken upon the hearing of the writ of "habeas corpus disclosed no dispute of fact." (P. 31.)

The only inquiry pertinent on the writ of habeas corpus and the return showing this relators' commitment as a deserter, was as to the jurisdiction and authority of the Commissioner to grant the commitment.

This was dependent upon whether he had before him the proof required by the Treaty.

No investigation was made as to that. A new investigation was had as to the condition of the vessel, its ownership, the degree of organization of its crew, &c., &c.

The status of the relator was treated as *res nova* before the Court, and because no register of a vessel or roll of a crew was there produced the Court rejudged the case, and reaching a conclusion different from that of the Commissioner, ordered the discharge of the deserter.

This was totally at variance with the office of a writ of habeas corpus, which can not be made to take the place of a writ of error. It was at variance with the treaty which gave the Russian Consul a right to the custody of the deserter, on satisfying the Commissioner as provided by the Treaty, and which in case of differences between captain and crew made the consular officer the judge between them.

III.

The Grounds of the Decisions below Stated and Considered.

The reasons assigned by the Courts below for denying to the Russian Government the comity for which we contend, or the relief provided by the Treaty, may now be considered.

Briefly stated, they are as follows:

(1) The exercise of comity can not be invoked in view of the Treaty, which operates a change in the law, and embodies the only obligations of the United States to Russia.

(2) The Treaty deals with completed vessels, and the *Variag* was not completed; with Russian vessels, and the *Variag* was not yet a Russian vessel.

(3) The Treaty applies to deserters from vessels, and the relator was never on board the *Variag*.

(4) The Treaty contemplates desertion from a crew, and the crew of the *Variag* was not organized; the men assigned to that service had not yet entered upon it.

(5) The evidence prescribed by the Treaty was not produced before the Court.

(6) Even the comity invoked was insufficient to authorize the detention of the relator, for that comity at most exempted foreign vessels and their contingent from the assertion of jurisdiction by local courts, whereas, in the present case, the exercise of that jurisdiction had been invoked in behalf of the foreign commander.

(7) The rules of comity are applicable only to organized bodies; the detail of officers and seamen in this case was not yet an organization, nor an "integral component" of the Russian Navy.

(8) The comity invoked does not apply to a foreign force intrusively and unauthorizedly present on our soil, but only to such forces as are on our soil by express permission of the Executive.

(1.)

The treaty with Russia did not abrogate the right of Russia to appeal to the exercise of that comity which was common to all civilized nations.

It is true, as observed by Judge Dallas, that treaties are usually allied with a change of law, but the change is an advance and betterment, not a retrograde movement abolishing the common rules universally adopted to

promote the interchange of good offices between sovereignties.

Treaties are not made to destroy authoritative doctrines, but rather to consecrate by solemn compact new ideas of progress and international amity.

The Treaty right is not confined to the privilege exercised under the comity of nations, to wit, the enforcement of Russian discipline on American soil; it goes beyond that, and makes it "a duty on the part of the Government of the United States to aid" the commander in the capture of a deserter from his force. (P. 43.)

The rule of comity left the commander free to enforce the discipline of the foreign force within our borders, while it did not make it an active duty of the Government to aid in the arrest of members of that force. The Treaty did make a change in that law as it then stood, but it was, as will always be found in the case of treaties, an extension and never a recession of the privileges secured by comity; the change was to impose an active duty on the part of the Government to aid the foreign commander in the enforcement of discipline. In the present case the aid was given, and discipline enforced by the arrest of the deserter, and the order to turn him over to the consul or the commander. Comity was respected and the treaty was enforced. At this stage came the interference of the authorities in disregard of both comity and treaty.

(2), (3), (4).

The Treaty deals with vessels, without reference to

their being completed or unfinished; it deals with crews, whether fully organized or still susceptible of additions to fill their possible complement.

The Treaty prescribes a standard for the determination of what is a vessel and what a crew, to wit: "The exhi- "bition of the register of the vessel, the roll of the crew, "or other official documents." If these things are exhibited they establish the existence of the vessel or of the crew for the purposes of the Treaty, and it is unnecessary to delve into expert evidence as to what remains to be done, either in filling out the complement of seamen which the Government may ultimately choose to employ in her management, or in fitting out the vessel, so as to leave no addition possible to her equipment.

But aside from this, the evidence produced on the investigation, which we insist was unauthorized, amply established that the vessel was afloat, and that the crew had entered upon its service.

Judge Dallas mistakenly says (p. 38), that the vessel "was still on the stocks." He had overlooked the testimony of Mr. Cramp (p. 14) to the effect that the vessel had been launched in the fall of 1899, while the relator left the crew of the ship on the 20th of April, 1900. (Pp. 6 and 9.)

The case of the *Eliza Ladd, 8 Fed. Cases, 491*, holds that when a vessel is launched she is a ship.

That the crew was organized and that the relator had entered upon his service is abundantly established by his own testimony at pages 5 to 9.

That the vessel was a Russian vessel is clearly shown

by the terms of the contract which was offered in evidence on behalf of the relator.

That he was never actually on board of the vessel can not be material; if he was a member of the crew, assigned to duty as such, and performing that duty, it is immaterial whether such duty actually brought him on board the vessel during the sojourn of the crew on American soil. The relator testified that he performed the duties required of him as a member of the crew, from October 1899 to April 1900, "in so far as it was his place as an assistant physician." If the crew was on shore, his attendance as an assistant physician required him to be on shore, it was this duty, as a member of the crew, which he shirked and abandoned. The act is a desertion from the ship to which he was attached.

(5.)

There is no requirement of the Treaty that the evidence which it prescribes as sufficient to invoke the aid of the authorities in arresting a deserter, shall be produced before any court which undertakes to investigate or review the proceedings.

The original records or documents mentioned in the Treaty are of a character that forbid their production at all times in the ordinary method governing in judicial proceedings. They form part of the essential records of vessels, and are to be simply "exhibited" to the local authority whose aid is invoked.

The District Judge found that "the proceedings before "the Commissioner were formally regular, and the testi-

"mony taken in the writ of habeas corpus discloses no "dispute of fact." Any further production of evidence was not required.

(6.)

Exemption from the jurisdiction of our courts has not been denied to any member of the Russian Army or Navy. In making the application for the arrest of the deserter the Vice-Consul invited the exercise of its jurisdiction. This is the position taken by Judge Dallas (p. 41). It has been answered under Point II.

(7.)

The rules of comity, it is insisted, are only applicable to organized bodies, forming an integral part of the naval or military forces of Russia, and the detail of officer and men to which the relator was attached was not such a body.

This point is very fully treated in the dissenting opinion of Judge Bradford at pages 49 and 50 of the Record.

The relator was a member of the Russian Navy; he came here as one of a detail of fifty-three regular sailors and an officer of the Imperial Russian Navy for the express purpose of manning the Russian cruiser *Variag*. (5, 8, and 6.)

It would be difficult to add to this conjunction of facts any element that would strengthen the unavoidable conclusion that the detail of officers and men composed, in the language of Judge Dallas, "when conjointly considered, a constituent unit of the Russian Navy," (P. 42.)

Judge Gray seems to have been convinced of this, for he concedes that the body in question was entitled to receive and enjoy the comity and privileges claimed if organized as part of the military or naval force of Russia "*coming here for the purpose disclosed in the record.*" (P. 44.)

(8.)

The remaining reason given in justification of the interference by the Court with the restoration of the relator to the custody of his commander, is that the body of which he formed a part was not on our soil by Executive permission; that "without permission such intrusion is a hostile act" (p 46); and that as a consequence, the detail of men under Captain Behr were not entitled to invoke the exercise of the comity claimed. (P. 47).

"If the Russian Government had requested this recog-"nition and admission as a distinctive part of its navy, "and that request had been acceded to by the Executive "Department" of our Government, says Judge Dallas, "a "different question would have been presented." (P. 42.) This request and permission are attested not only by the letter of the Secretary of the Treasury, and the suggestion of the United States Attorney, but more fully and completely by the additional correspondence furnished to this Court by the State and Treasury Departments.

They dispose of the last doubt which burdened the judgment of the Circuit Court of Appeals, and call for a reversal of the order discharging the relator.

PAUL FULLER,
Of Counsel for Petitioner.

12th November, 1901.